Commercial Landlord & Tenant: Less Technicality, More Commerciality

The Case of *London Trocadero Ltd v Family Leisure Holdings Ltd* [2012] EWCA Civ 1037

The Facts

On 30 September 2002, a lease was granted to West End Amusement Parks Ltd ('the Tenant') in respect of part of the Trocadero building.

The Trocadero building is located in the heart of London and extends to over 600,000 square feet. The building has many tenants and licensees running different kinds of businesses and has an estimated '*footfall*' in excess of 9 million per annum.

The Tenant's lease granted rights to the Tenant over the building but it also contained detailed provisions regarding deliveries and removals to ensure good estate management and to avoid unreasonable disruption to other businesses in the building. The lease stated:

> Section 2
>
> 3.2 There are granted the rights and easements set out in Schedule 1.
>
> Schedule 1
>
> 1 …, a right of way … for the Tenant and all others authorised by the Tenant to pass to and from the premises on foot over and along the Common Parts …
>
> 2 …, the right … to load and unload vehicles in the Loading Area …

Clause 52 of the lease provided that a person who was not a party to the lease had no right to enforce its terms but that this prohibition did not affect that person's rights outside the terms of the lease.

The Tenant allowed its subsidiary company, West End Amusements Ltd ('WEA'), to trade from the premises.

On 14 January 2003, WEA entered into a hire agreement with the Tenant's parent company, Family Leisure Holdings Ltd ('the Claimant') in respect of gaming and amusement machines. It was a term of the hire agreement that (a) ownership of the machines remained with the Claimant (b) the agreement would terminate if WEA became insolvent and (c) on termination of the agreement, the Claimant could enter WEA's premises and take the machines. Around 450 bulky machines were subsequently installed in the premises.

On 22 June 2011, the Tenant and WEA notified their intention to appoint administrators. In the circumstances, the Claimant treated the hire agreement as terminated and, on 6 July 2011, the Claimant indicated its wish to enter WEA's premises for the purpose of taking back its machines.

The Tenant, WEA and their joint administrators (who acted together) agreed that the Claimant should take its machines to avoid potential third party liabilities arising and financial exposure to the Claimant and so the joint administrators informed the Landlord that they proposed to allow the Claimant to attend the premises and remove its machines.

The Landlord asked for a method statement and the Claimant's removal company prepared a method statement but it was incomplete.

Despite having previously indicated its desire that the machines be removed, on 5 August 2011, the Landlord claimed that the Claimant's proposed removal operation was unclear and expressed concern that it may cause disruption. On 18 August 2011, the Landlord accepted the Tenant had a right of access to the premises but claimed that the Claimant did not despite it had the Tenant's consent and the administrators' consent.

On 31 August 2011, the Claimant commenced proceedings in the Manchester District Registry for the wrongful interference with its machines and, on 6 September 2011, the Claimant applied for an order for the delivery up of its machines.

On 3 October 2011 and following the Court's criticism of the Claimant's incomplete method statement for the removal of the machines, the Claimant provided a complete method statement. Nevertheless, the Landlord continued to claim that the Claimant did not have a right to access the premises (although it was willing to accept compensation in return for its permission).

The Landlord also claimed that the Claimant had no standing to commence legal proceedings against it based on a number of grounds including the fact that clause 52 of the lease provided that a person who was not a party to the lease had no right to enforce its terms.

On 10 November 2011, the Court declared that the Claimant had a right to remove the machines and rejected the Landlord's claim that the Claimant had no standing. That said, the Court stayed the effect of its order pending a possible application by the Landlord for permission to appeal. The Landlord subsequently applied for, and was granted, permission to appeal to the Court of Appeal.

The Court of Appeal's Decision

Lord Justice Davis gave the Court of Appeal's decision on 26 July 2012 to which Mrs Justice Baron and Lady Justice Arden agreed.

The Claimant's Right of Access

The Court immediately recognised that the lease granted rights to the Tenant and that the lease's definition of '*the tenant*' did not include the Claimant. Nevertheless, it was clear that the right to pass over common parts set out in paragraph 1 of Schedule 1 to the lease was granted to '*all others authorised by the Tenant*' and that this included the Claimant.

However, the right to load and unload vehicles in paragraph 2 of Schedule 1 was not expressly granted to '*all others authorised by the Tenant*' so the Court considered whether to imply such words (which would benefit the Claimant because it had the Tenant's consent).

The Landlord submitted that such words should not be implied on the basis that their omission was intended for good estate management and, in the context of a building such as the Trocadero, there was a need for the Landlord to deal only with the contractually-named Tenant.

The Court dismissed the Landlord's submission and implied the words '*all others authorised by the Tenant*' (otherwise the Tenant could not even engage companies like DHL or Pickfords to load and unload vehicles in the loading area).

The Claimant's Standing to Commence Proceedings

The Court of Appeal agreed with the lower court that the Claimant's claim was not based on a wrongful interference with rights of access granted by the Tenant's lease. Instead, the Claimant's claim was based on the wrongful interference with its machines which was a separate right it had outside the terms of the Tenant's lease.

Taking into consideration the Court had already implied a right of access for '*all others authorised by the Tenant*' and the Claimant had the Tenant's consent, the Landlord was liable for wrongfully interfering with the Claimant's machines because the Landlord prevented the Claimant from taking possession of them by refusing to allow the Claimant access to the premises.

The Message For Landlords

Commercial landlords should not rely entirely on what a lease expressly states and what it does not expressly state. The Courts can, and do, imply terms into leases thereby changing the nature and effect of what is expressly stated.

Furthermore, landlords should not rely entirely on the express (and implied) terms of a tenant's lease. Tenants and third parties outside the landlord and tenant relationship often possess separate causes of action, under statute or in the common law, irrespective of the terms of a lease.

Finally, there are occasions (illustrated by the case of *London Trocadero)* when it would be more appropriate to adopt a less technical, and more commercial, position.

In the case of *London Trocadero*, the machines located in the premises were owned by a third party. The Landlord had previously indicated its desire that the machines be removed but their removal would have been costly. The Tenant was insolvent but the third party owner of the machines was not and it was the third party owner who offered to remove the machines from the premises at its cost. The Landlord should have taken the commercially sensible decision and agreed.

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